Criminal conviction of professor for refusal to give access to research files did not affect his Convention rights

Dirk Voorhoof and Rónán Ó Fathaigh

The Grand Chamber of the European Court has, more firmly than its Chamber ***judgment*** of 2010, confirmed that a Swedish professor could not rely on his right of privacy under Article 8, nor on his (negative) right to freedom of expression and information under Article 10 of the Convention to justify his refusal to give access to research material at Gothenburg University (see comment on Chamber judgment ***here***). The Court unanimously concluded that the criminal conviction of the professor for not giving access to the requested documents did not affect his rights under Article 8 and 10 of the Convention. Most importantly, the Grand Chamber also referred under Article 10 of the Convention to the right "to receive information in the form of access to the public documents" (§ 93 and 94).

First, a brief summary of the facts: A professor at the University of Gothenburg, Mr. Gillberg, had been responsible for a long-term research project on hyperactivity and attention-deficit disorders in children. Certain assurances were made to the children's parents and later to the children themselves concerning the confidentiality of the collected data. The research papers, called the Gothenburg study, were voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. It contained a very large amount of privacy-sensitive data about the children and their relatives.

Two researchers (K and E) not connected to the University of Gothenburg requested access to the research material. One had no interest in the personal data as such but in the method used and the evidence the researchers had for their conclusions, the other wanted access to the material to keep up with current research. Both requests were refused by the University of Gothenburg, but the two researchers appealed against the decisions. The Administrative Court of Appeal found that the researchers should be granted access to the material, as they had shown a legitimate interest and could be assumed to be well acquainted with the handling of confidential data. It was also considered important to the neuropsychiatric debate that the material in question could be exposed to independent and critical examination. A list of conditions was set for each of the two researchers, which included restrictions on the use of the material and the prohibition to remove copies from the university premises. Notified that the two researchers were entitled to immediate access by virtue of the judgments, first Mr. Gillberg and later the university refused to give access to the researchers. The university decisions were annulled however by two judgments of the Administrative Court of Appeal. A few days later, colleagues of Mr. Gillberg destroyed the research material.

The Swedish Parliamentary Ombudsman brought criminal proceedings against Mr. Gillberg, and a short time later he was convicted of misuse of office. Mr. Gillberg was given a suspended sentence and a fine of the equivalent of 4,000 euro. The university's vice president and the officials who had destroyed the research material were also convicted. Mr. Gillberg's conviction was upheld by the Court of Appeal and leave to appeal to the Supreme Court was refused. Mr. Gillberg lodged an application with the European Court of Human Rights. He complained in particular that his criminal conviction breached his rights under Articles 8 and 10.

While on the face of it the case raised important ethical issues involving the interest of the children participating in the research, medical research in general and public access to information, the Chamber and now also the Grand Chamber considered itself only being in a position to examine whether Mr. Gillberg's criminal conviction for refusing to execute a court order granting access to official documents was compatible with the Convention.

As to the alleged breach of Article 8 of the Convention, the Court reiterated the concept of "private life" being a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person and it can therefore embrace multiple aspects of the person's physical and social identity. Moreover, Article 8 protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. However, the Court was of the opinion that the conviction of Mr. Gillberg did not affect his right of privacy. Indeed the conviction of Mr. Gillberg was not the result of an unforeseeable application of the law on access to public documents in Sweden and the offence in question had no obvious bearing on the right to respect for "private life". On the contrary, it concerned professional acts and omissions by public officials in the exercise of their duties. Nor had Mr. Gillberg pointed to any concrete repercussions on his private life which were directly and causally linked to his conviction for that specific offence.

The Court confirmed that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence. As there was no indication that the impugned conviction had any repercussions on Mr. Gillberg's professional activities which went beyond the foreseeable consequences of the criminal offence for which he was convicted, his rights under Article 8 have not been affected.

With regard the alleged breach of Article 10, the Court clarified that in the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his "positive" right to freedom of expression. Indeed Mr. Gillberg argued that he had a "negative" right within the meaning of Article 10 to refuse to make the disputed research material available, and that consequently his conviction was in violation of Article 10 of the Convention. The Court did not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention, but found that this issue should be properly addressed in the circumstances of a given case. The circumstances were that the material consisted of public documents subject to the principle of public access under the Swedish Freedom of the Press Act and the Secrecy Act. That entailed, among other things, that secrecy could not be determined until a request for access was submitted, and it was impossible in advance for a public authority (or a researcher) to enter into an agreement with a third party exempting certain official documents from the right to public access.

The Court also emphasised that Mr. Gillberg was not prevented from complying with the judgments of the Administrative Court of Appeal by any statutory duty of secrecy or any order from his public employer. Rather, his refusal to make the research material available was motivated by his personal belief that for various reasons the outcome of the judgments of the Administrative Court of Appeal was wrong. Taking these circumstances into account, the Court considered that the crucial question could be narrowed down to whether Mr. Gillberg, as a public

employee, had an independent negative right within the meaning of Article 10 of the Convention not to make the research material available, although the material did not belong to him but to his public employer, the University of Gothenburg, and despite the fact that his public employer – the university – actually intended to comply with the final judgments of the Administrative Court of Appeal granting K and E access to its research material on various conditions, but was prevented from so doing because Mr. Gillberg refused to make it available.

Most crucially is the statement by the Court that the finding that Mr. Gillberg would have a right under Article 10 of the Convention to refuse to give access to the research material in this case would not only run counter to the property rights of the University of Gothenburg, but "*it would also impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned*", thereby recognising the applicability of Article 10 from another angle, which was not the one Mr. Gillberg could rely on.

According to the Court the claim of Mr. Gillberg was neither comparable with the claim under Article 10 of journalists to have their sources protected. The Court clarified that Mr. Gillberg's refusal in the present case to comply with the judgments of the Administrative Court of Appeal, by denying K and E access to the research material, hindered the free exchange of opinions and ideas on the research in question, notably on the evidence and methods used by the researchers in reaching their conclusions, which constituted the main subject of K's and E's interest. In these circumstances the Court found that Mr. Gillberg's situation could not be compared to that of journalists protecting their sources.

On these grounds the Grand Chamber reached the conclusion that the rights of Mr. Gillberg under Article 8 and 10 of the Convention have not been affected. The Grand Chamber simply stated that these rights do not apply in the instant case.

Comment

The Grand Chamber has made clear that a director of a research institute or the supervisor of a research project refusing to execute a court order to grant access to research files, cannot rely on Article 8 or 10 of the Convention. It is interesting to note that the Grand Chamber dismisses the 'negative' right to keep silent and to refuse to communicate in such circumstances relying on Article 10 of the Convention. At the same time the Grand Chamber refers to the right under Article 10 of other researches to have access to research files.

The most significant aspect of this judgment is what the Grand Chamber has to say about access to information under Article 10. The Court held that were Mr. Gillberg to have a right to withhold the research information, "it would impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned ...". The question thus arises whether the Grand Chamber is contributing to a further development of a right to access to information.

The Court does mention "rights under Article 10", which would seem to lean in favour of developing a right of access to information under Article 10. However, there are two points that

may be made in contrast to this view: First, earlier in the judgment, the Court reiterates that Article 10 "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him", citing ***Leander v. Sweden*** and ***Gaskin v. the United Kingdom*** . Both of these cases also established that Article 10 did not confer an individual right of access to certain information, nor imposed an obligation on governments to impart such information. Thus, it would seem that ***Leander*** and ***Gaskin*** would count against recognition of a general right of access to information.

Second, it is somewhat curious, and notable, that the Grand Chamber omits any mention of the line of case law which, it may be argued, is developing a right of access to information under Article 10, namely ***Matky v. Czech Republic***, ***Társaság a Szabadságjogokért v. Hungary***, and ***Kenedi v. Hungary***. In ***Társaság***, for example, it had been stated that "the Court has recently advanced towards a broader interpretation of the notion of freedom to receive information ... and thereby towards the recognition of a right of access to information".

It would seem, however, that the Grand Chamber has left the question open, although the wording of the judgment in ***Gillberg*** may hint towards recognition of such a right of access to information in the future. More concretely, the judgment in ***Gillberg*** is certainly an eye-opener both for researchers processing personal data and universities, confronted with the application of access to public documents laws.

(For a full discussion on right of access to state held information, see ***article*** by W. Hins and D. Voorhoof. See also in the United Kingdom, where the Court of Appeal has recently ***held*** a right of access to court documents, describing the Strasbourg jurisprudence as "leading in the same direction", but not there yet)